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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/758,459

Filing Date: January 15, 2004

Appellant(s): LUMMIS ET AL.

Clinton R. Stuart
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 04/20/2009 appealing from the Office action mailed 12/17/2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,904,243	Porter	5-1999
3,011,820	Frieder et al.	12-1961
2,705,461	Campbell	4-1955

2003/0226846	Horwath	12-2003
4,308,905	Gallagher	1-1982

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 1-15 stand rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which appellant regards as the invention.

“second gaps, wherein each of the first and second support straps provide no more than one point of contact between the securing strap and the first and second support straps on respective sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover’s ability to withstand peak wind conditions” (claim 8, emphasis added)

This recitation asserts that when the cover has only point of support, the cover would have superior ability to withstand wind condition as compared with cover multiple support locations. The recitation is contrary to the laws of physics wherein having multiple support locations would decrease the acting force on the cover by $\frac{1}{2}$ by each additional supporting location.

2. Claim 8 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Porter (5904243), or in the alternative, under 35 U.S.C. 103(a) as being unpatentable over Porter in view of Frieder et al. (3011820). Porter teaches a the securing of a cover comprising the steps of placing the cover (see the cover in figs. 16, and 17) over the module and threading a securing strap 3.67 through a channel (3.321 shown in cross section in Fig. 17) the cover through the two

supports approximately at the midpoint of the cover in Figs. 16 and 19. Porter also teaches the tightening the securing strap about the module as claimed.

Porter meets all claimed limitations except for the limitation of having no more than one point of contact at the approximately midpoint of the first and second sides of the modules. It would have been obvious to one of ordinary skill in the art to provide only one support at the midpoint to provide the desired number of support and/or to save material. Furthermore, it would have been obvious to one of ordinary skill in this art to eliminate the other when its function is not desired.

In the alternative, Frieder teaches that it is known in the art to provide the sides with only one support at the midpoint along the four sides of the cover (note figure 1). It would have been obvious to one of ordinary skill in the art to provide only one support, as taught by Frieder, to provide the desired number of support and/or to save material.

3. Claims 1-3, 5, 6, 9-11, and 13-15 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the Porter rejection, as set forth above in paragraph 2, and further in view of either Horwath (2003/0226846) or Gallagher (4308905).

Porter teaches a top member 3.29, a first and second sidewall members defining a first gap (where strap is exposed at 3.67) first and second end walls members a channel extending around the cover at 3.321. Porter teaches one channel on the end wall in Fig. 19, but does not mention the channel on the opposite end wall in Fig. 16. To provide a channel similar to that of the left side (shown as the right side in Fig. 19) in the right side would have been obvious for a multiplied effect as either Horwath or Gallagher teaches that it is known in the art to provide strap channels on both the end walls. Thus, to provide a channel on the other end wall in Porter would

have been obvious to provide the desired coverage of the channel for accommodating the strap and for added security.

With respect to support strap at the midpoint, to have the only one support strap in the modified cover of Porter to be placed at the midpoint at the corresponding side walls would have been obvious to provide save material.

Regarding claim 2, with respect of threading the strap through the first and second support straps, it would have been obvious to one of ordinary skill in the art to eliminate the rings so that the strap are threaded through the first and second support straps to save material.

4. Claims 4, 7 and 12 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the Porter rejection as set forth in paragraph 3, and further in view of either Campbell (2705461) or Frieder et al. (3011820). Either Campbell or Frieder teaches that it is known in the art to provide diamond shaped loops as shown in Fig. 1 at point 20 in Frieder and at 13 in fig. 4 in Campbell wherein the portions defined by points 11, and 11A forming a diamond shaped loop. Thus, it would have been obvious to one of ordinary skill in the art to provide diamond shaped loops, as taught by either Campbell or Frieder to provide an alternative shape loop.

(10) Response to Argument

5. Appellant's arguments have been fully considered but they are not persuasive.

Claim 8 is representative of the invention. The examiner submits that the only difference between the claimed cover and the cover of Porter is that the cover of Porter has multiple support points as compared to the claimed invention which set forth only one point of support at midpoints along each of the two sides instead of using multiple points of contact.

Appellant provided two affidavits, one by Mr. Daniel, co-inventor, filed 12/13/2007, and the other by Mr. Taubert, filed 06/13/2008. The examiner answered each of these affidavits separately in subsequent office actions. It is noted that the disclosed invention has several structural differences over the Porter reference (US. 5904243). Inter alias, the diamond shaped support at 58, the cover is made from various piece structures, one forming the top with its edge at 52, and the other pieces are portions 30 and 36. The two declarations both assert improvements over the Porter cover and single out the sole reason for this benefit by the placement of a single support at midpoint of the cover.

The Daniel's affidavit asserts that the main improvement of having a concentration of vertical force along a single path (paragraph 8) leads to commercial success (paragraph 7).

The examiner submits that the laws of physics would dictate that multiple points of support along the cover against the bale would increase the tightening of the cover against the bale. The examiner also submits that to provide one point of support, as compared to multiple points as taught by Porter would have been obvious to provide the desired support strength of the cover on the bale and to save material. The examiner submits that the laws of physics are paramount and to assert that the single point as compared to multiple point of support would increase the holding strength of the cover on the bale would run counter to the law of physics.

The examiner submits that the affidavits of Mr. Daniel and Taubert fail to establish the nexus between the applied art and the claimed invention. In this case, if the only difference between the cover of Porter and the claimed device is that there is only one support at the midpoint at the center of the sidewall, then the Porter cover must be used with only one support point to establish this nexus. In this case, appellant makes a broad assertion that 33 percent of

the company's sales of four modules covers as evidence for establishing the nexus that the single point support structure is the sole primary reason for such a sales figure. The examiner submits that such assertion is unreliable and ineffective. Furthermore, it seems that 33 percent as compared with three other module covers does not equate with commercial success.

Mr. Daniel also fails to proffer any hard evidence or provide any detailed analysis to arrive at the conclusion that the sole purpose for the commercial success is due to the placement of a single support at the midpoint of the cover.

In the Taubert affidavit, Mr. Taubert attests to the using of the cover of Porter for more than 3 years, but has discontinued use of such product (paragraph 7). Mr. Taubert then goes on to assert that the sole reason for this superiority of the claimed cover over the LPB cover is due to the single point support as set forth in the independent claims.

Mr. Taubert's declaration in paragraph 14 asserts that the claimed cover is superior due to the use of the cover made from Kenny Porter/L.P. Brown Co. vs. the cover by IFPCO during the harvest season does not set forth the nexus necessary between the success and the claimed invention. The examiner submits that there are numerous factors that have not been considered in the declaration that are critical in the determination of the performance, e.g., wind can be varied from year to year, the cover can be placed at different places that can experience different degrees of wind speed and conditions, the consideration of installation, the presence of other non-claimed features like the diamond shaped support point.

Similar to the reasons, *supra*, the examiner submits that to assert that the single point as compared to multiple point of support would increase the holding strength of the cover on the bale would run counter to the laws of physics.

Further, Mr. Taubert's assertion of the superiority of the claimed cover cannot take the place of evidence. So far, appellant has not provided any data or evidence of how the data are considered and gathered, and analyzed.

The examiner submits that neither the Taubert nor the Daniel declarations overcome the rejection under 35 U.S.C. 103(a).

With respect to the obvious rejection over Porter in view of either Horwath or Gallagher, appellant asserts that there is no motivation to make the modification of Porter. The examiner submits that Porter in Fig. 16 shows no channel on the right side of the cover. The examiner submits that to provide a channel similar to that of the left side (shown as the right side in Fig. 19) in the right side would have been obvious for a multiplied effect (St. Regis Paper Co. v. Bemis Co., Inc.)193 USPQ 8, 11 (7th Cir. 1977). Either Gallagher or Horwath teaches that it is known in the art to provide channels on both the end sides of the cover. Thus, to provide another channel on the right side of the cover in Fig. 16 would have been obvious.

With respect for the diamond shaped loops, it is submitted that either Campbell or Frieder teaches that it is known in the art to provide diamond shaped loops. Thus, it would have been obvious to one of ordinary skill in the art to provide diamond shaped loops, as taught by either Campbell or Frieder to provide an alternative shape loop as point of support.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Tri Mai, AU3781

/Tri M Mai/

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